Supreme Court, U.S.
FILED
JUN 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

# No. 87-382

IN THE

# Supreme Court of the United States

October Term, 1987

THE STATE TAX COMMISSION OF THE STATE OF NEW YORK, RODERICK G.W. CHU, as Commissioner of Taxation and Finance of the State of New York, and THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

*Petitioners,*

*against*

HERZOG BROTHERS TRUCKING, INC., a/k/a Herzog Brothers, Inc., GREGORY HERZOG, GARY HERZOG, STEPHEN HERZOG and DAVID HERZOG,

*Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

## RESPONDENTS' SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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Dated: June 15, 1988

Batavia Times Publishing Co.
Batavia, N.Y. (716) 344-2000

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## RESPONDENTS' SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

The brief for the United States as *amicus curiae* does not reveal that the opinion of the Court of Appeals of the State of New York is in conflict with any decision of this Court. That brief does, however, contain several erroneous assumptions and offers views which are unsupported by existing law.

## I. Argument

### A. The views of the United States are not supported by federal pre-emption principles enunciated by the Supreme Court.

The United States, as *amicus curiae,* proceeds upon the erroneous assumption set forth on page 10 of its brief that the "only question presented" in this case is whether respondent Herzog Brothers Trucking, Inc. ("Herzog")[1], as a non-Indian wholesale distributor, can be compelled under New York's Tax Law to prepay the State's motor fuel and sales taxes on motor fuel delivered to Indian retail establishments on an Indian reservation. New York's Tax Law is not so limited and imposes substantial other impermissible burdens upon Herzog's wholesale sales to Indians on Indian reservations.

New York's Tax Law provides that it is a distributor, such as Herzog, who is to bear the burden of *paying* the motor fuel and sales taxes and seeking collection of such taxes from its customers (Opinion of the Court of Appeals, pages A4-A5).[2] New York's Tax Law and regulations also provide comprehensive and detailed regulation of a distributor's sale of motor fuel in the State and, if enforced, would additionally burden Herzog's trade with reservation Indians. The most significant of these burdens include: (i) compliance with State requirements for registration as a distributor pursuant to New York Tax Law §283(1)(2); (ii) furnishing a bond to secure the payment of State taxes pursuant to

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[1] Pursuant to Rule 28.1, it should be noted that respondent Herzog Brothers Trucking, Inc. does not have any parent, subsidiary or affiliated corporations.

[2] Unless otherwise noted, numbers in parenthesis preceded by the letter "A" are references to the pages of the appendix to the petition.

New York Tax Law §283(3), the minimum amount of which is $50,000, and is more likely to be $100,000 as set forth in 20 New York Code of Rules and Regulations §411.2(b); (iii) compliance with State record keeping requirements set forth in New York Tax Law §§286, 286-a; and (iv) the filing of monthly returns pursuant to New York Tax Law §287. *See also,* New York Tax Law §§1134, 1135, 1136 and 1137 (providing further requirements with respect to State sales taxes).

The United States fails to mention any of these additional burdens in its brief, but each is significant.[3] The costs incurred by Herzog to comply with the special requirements of New York's Tax Law necessarily would increase the price of the motor fuel sold to its Indian customers. None of these costs would otherwise be incurred by Herzog since its only transactions in New York are its sales to Indians on Indian reservations.

The United States concedes at page 12 of its brief that "wholesale sales by a non-Indian distributor to an Indian retailer on an Indian reservation are within the broad sweep of the Indian trader statutes, which apply to '[a]ny person desiring to trade with the Indians on any Indian reservation' (25 U.S.C. 262)." That concession being made, the conclusion that state taxation and regulation of such transactions is preempted by such federal law must necessarily follow.

In *Central Machinery Company v. Arizona Tax Commission,* 448 U.S. 160 (1980), this Court reaffirmed that the Indian trader statutes and regulations are ". . .

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[3] In *Central Machinery Company v. Arizona Tax Commission,* 448 U.S. 160 (1980) this Court held that the imposition of state taxes totaling $2,916.62 on sales to Indians was an impermissible burden where the Indian trader statutes pre-empted state taxation and regulation of sales made to Indians.

in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." 448 U.S. at 163-164. Indeed, citing *Warren Trading Post Company v. Arizona State Tax Commission*, 380 U.S. 685 (1965), this Court further held that "there is no room for states to legislate on the subject." 448 U.S. at 166.

After determining that petitioners' application of New York's Tax Law imposes burdens upon Herzog's wholesale sales to Indians on Indian reservations, the Court of Appeals correctly concluded that the foregoing cases of this Court construing the Indian trader statutes were dispositive:

> We determine that Congress has pre-empted the field of regulating trade with Indians on reservations and has left "no room" for the application of supplementary state tax laws, such as the one here at issue, that impose "additional burdens" on Indian traders (*see, Warren Trading Post Co. v. Arizona Tax Com.*, 380 US 685, 690 *supra*). Thus, no matter how minimal the burden imposed by the motor fuel taxation scheme on Herzog, as a trader to the Seneca Nation, such regulation is pre-empted by the federal trader laws . . . (Opinion of the Court of Appeals, page A14).

The view of the United States at page 10 of its brief that the Court of Appeals gave "too broad a preemptive effect to the Indian trader statutes" suggests that the court below misapplied established principles articulated by this Court. This is not the case. The opinion of the Court of Appeals follows in every respect this Court's directives in *Central Machinery* and *Warren Trading Post* that there is "no room" for supplementary state laws which impose "additional burdens" on sales made to Indians on Indian reservations. State laws requiring

payment of taxes, registration as a distributor, record keeping, furnishing a bond and filing of monthly returns are equally pre-empted. *Accord, White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980) (state regulation, licensing and taxation of a non-Indian logging company harvesting and selling tribal lumber was pre-empted by comprehensive federal regulation).

**B. The United States has not furnished sufficient reasons why this case should be remanded to the Court of Appeals for reconsideration.**

The United States focuses its attention on Indian retailers who, consistent with this Court's decisions in *Moe v. Confederated Salish and Kootenai Tribes of the Flat Head Reservation,* 425 U.S. 463 (1976) and *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980), may be required to collect a state tax from non-Indian retail purchasers and remit the same to the state. The United States argues at pages 13-14 of its brief that the burdens which the petitioners seek to impose on Herzog under New York's Tax Law are "ancillary" to the burdens which the State may, under *Moe* and *Confederated Tribes,* impose on the Indian retailers with respect to their sales to non-Indians. The same argument was advanced in the court below by the petitioners and rejected by the Court of Appeals (Opinion of the Court of Appeals, pages A8, A11-A12).

The United States ignores a critical distinction articulated in *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980), where this Court held:

> The Indian traders statutes, 25 U.S.C. §261, *et seq.*, incorporate a congressional desire comprehensively to regulate businesses selling goods

> to reservation Indians for cash or exchange, *see Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965), but no similar intent is evident with respect to sales made by Indians to nonmembers of the tribe. 447 U.S. at 155-156.

This distinction was found to be determinative by the Court of Appeals in this case. (Opinion of the Court of Appeals, pages A11-A12.) Herzog's sales to Indians on Indian reservations are governed by the Indian traders statutes and regulations, and there is "no room" for state laws imposing "additional burdens" on traders. The reasonableness of state burdens on sales to Indians is, of course, immaterial since all state burdens are precluded. Any subsequent sales by reservation Indians to non-Indians are not so governed, and the state is free to impose minimal burdens on the Indian retailer.[4]

The United States, on page 14 of its brief, offers its view that "especially in modern times," the Indian trader statutes should not be read "inflexibly" to bar a state from imposing burdens on the trade between Herzog and its Indian customers. But, just eight years ago, in *Central Machinery Company v. Arizona Tax Commission*, 448 U.S. 160 (1980), this Court held:

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[4] With respect to an Indian retailer's sales to non-Indians, this Court in *Moe* and *Confederated Tribes* sanctioned state requirements that the Indian retailer collect a tax or purchase tax stamps from the state to be affixed to the product as a condition of the retail sale. But such requirements are totally independent from the wholesale transaction between the Indian retailer and his supplier. *See*, Respondents' Brief in Opposition, pages 10-14. Burdens which may be imposed on transactions not covered by the Indian trader statutes cannot serve as authority for the imposition of burdens on transactions clearly within the scope of the Indian trader statutes, as argued by the United States at pages 12-13 of its brief. Also, the Indian/non-Indian status of the seller is immaterial. It is the identity of the purchaser which controls the application of the Indian trader statutes.

> It may be that in light of modern conditions the State of Arizona should be allowed to tax transactions such as the one involved in this case. Until Congress repeals or amends the Indian trader statutes, however, we must give them "a sweep as broad as [their] language," [citation omitted] and interpret them in light of the intent of the Congress that enacted them [citations omitted]. 448 U.S. at 166.

The Court of Appeals expressly followed this holding. (Opinion of the Court of Appeals, pages A13-A14.)

References by the United States at pages 15-17 of its brief to petitioners' proposed regulations, some of which have been reduced to writing, negotiations by and among counsel for the petitioners and the Seneca Nation, and possible agreements between them as to the prospective collection of state taxes and sharing of revenues therefrom, are completely irrelevant to the case at bar and can have no bearing on its disposition. Herzog has already been assessed state motor fuel and sales taxes in excess of $400,000 for the period through June 30, 1985. It is inconceivable how "proposed regulations" or current negotiations three years later between the State and the Seneca Nation could, in any way, affect the outcome of this case. Neither this Court nor the Court of Appeals should be engaged in such speculation.

The Court of Appeals' decision was not based on the ultimate disposition of the motor fuel purchased from Herzog by the Indian vendors. The rationale was simply that State regulation of Herzog's sales to such Indian vendors is pre-empted by federal law. (Opinion of the Court of Appeals, pages A13-A14.) The proposed regulations do not affect the rationale of the decision below, but constitute a persistent attempt to advance a view already rejected by the Court of Appeals. Hence,

remand for reconsideration is inappropriate here.[5]

The United States, on page 17 of its brief, refers to the Court of Appeals' decision as an "impediment" to negotiations between the State and the Seneca Nation and an "appropriate resolution of controversy concerning the application of the State's excise and sales taxes to on-reservation sales of motor fuel." It is not the Court of Appeals' decision which is the "impediment," if that is the appropriate term, but, rather, the long-standing principles of federal pre-emption articulated by this Court which the petitioners, and now the United States, refuse to accept. If a prospective change is to be made, it must come from Congress. This Court, in *Central Machinery,* held that nothing short of repeal or modification of the Indian trader statutes by Congress could alter their pre-emptive effect. *Central Machinery Company v. Arizona Tax Commission,* 448 U.S. at 166.[6]

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[5] While reconsideration may be proper where an intervening judicial decision materially affects the legal foundation of the decision appealed from, *see, e.g., Alabama v. Ritter,* 454 U.S. 885 (1981) (reconsideration ordered in light of intervening state decision in companion case involving same occurrence), it is clearly unwarranted where the intervening change is immaterial to the reasoning of the court below. Also, the proposed new regulations cannot have *ex post facto* application to the assessments which are the subject of this action. Nor is this a case involving solely prospective application of a law where intervening legislation may even render the original action moot. *See, e.g., Bureau of Economic Analysis v. Long,* 454 U.S. 934 (1981) (reconsideration ordered with respect to freedom of information request for tax records in light of intervening amendment to tax statute).

[6] The United States mentions, but takes no position as to the application of the Hayden-Cartwright Act, 4 U.S.C. §104. *See* Brief for the United States, at page 12, fn. 8. That 1936 act, which appears to sanction the imposition of state motor fuel taxes in certain instances on "United States military or other reservations," does not contain any references to Indians or Indian reservations. If it was the intention of Congress to include Indian reservations within the act, it could have easily so provided. More significantly, however, it should

(Footnote continued on following page.)

It is surprising that the United States has not even commented on an alternative mechanism currently available to the State for the collection of its motor fuel and sales taxes or whether resorting to that mechanism would be an "appropriate resolution." The holding of the Court of Appeals simply requires petitioners to enforce New York's Tax Law at the next level of distribution, *i.e.*, sales made by Indian retailers to non-Indian retail purchasers. Indeed, under New York Tax Law §285, Indian retailers who have received tax-free motor fuel from Herzog may be required to collect and remit the State's motor fuel and sales taxes with respect to any sales thereafter made to non-Indian retail purchasers. This is certainly consistent with the *Moe* and *Confederated Tribes* cases. Yet, petitioners have never

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(Footnote continued from preceding page.)

be noted that this Court in *Warren Trading Post* held that the Buck Act, 4 U.S.C. §105 *et seq.*, which sanctions the imposition of state sales and use taxes in "federal areas" did not apply to Indian reservations. *Warren Trading Post Company v. Arizona State Tax Commission*, 380 U.S. at 691, fn. 18. This holding has been reaffirmed by the Court. *Central Machinery Company v. Arizona Tax Commission*, 448 U.S. at 166, fn. 5. And, in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), a case involving the assessment of a state excise or use fuel tax on a non-Indian logging company, this Court held that the Hayden-Cartwright Act "was not designed to overcome the otherwise preemptive effect of federal regulation of tribal lumber." 448 U.S. at 151, fn. 16. Since the Court in *White Mountain* equated the pre-emptive effect of federal regulation of tribal lumber with the pre-emptive effect of the Indian trader statutes, 448 U.S. at 151, fn. 15, it follows that the Hayden-Cartwright Act would not overcome the pre-emptive effect of the Indian trader statutes. The 1940 opinion of the Department of the Interior, 57 I.D. 129, referred to by the United States is of dubious relevance. For example, in that opinion, it was also the view of the Department of the Interior that purchases of cigarettes by non-Indians from Indians were exempt from state taxes, 57 I.D. at 140-141, a conclusion later rejected by this Court in *Moe* and *Confederated Tribes*.

sought to apply New York's Tax Law in this regard. Certainly, such an application by the petitioners would obviate the need for new regulations, both written and oral, continuing discussions with the United States in this regard, negotiations with the Seneca Indians and a remand of this case for "further considerations" by the Court of Appeals as the United States suggests.

## II. Conclusion

The petition for a writ of certiorari should be denied.

Dated: Buffalo, New York
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